the instant case far transcends the rights or interests of these particular litigants.

Since this is a claim for personal injuries, as distinguished from one for cargo or hull damage, the question of applicability of the rule is one not heretofore passed upon by this Honorable Court.

The Court of Appeals for the Fifth Circuit, in its instant opinion, evaded the question, so far as we are able to ascertain, and we respectfully submit that the problem merits the favorable consideration of this Court.

(2)

**The Standard Applied by the Court of Appeals in Sustaining the Jury's Verdict was Erroneous**

The Court of Appeals in the instant case apparently felt that the rule of *The Pennsylvania* was applicable to the case. Yet, in appraising the evidence, the Court of Appeals did not apply *The Pennsylvania* rule. Moreover, in evaluating the evidence from the standpoint of its permissive inferences, the Court of Appeals imputed to the jury findings which, in essence, permit respondent to have successfully pleaded its own turpitued as a defense.

We are fully cognizant of the well established principle that a jury's verdict must be sustained if there is more than a scintilla of evidence upon which to base a reasonable

supporting inference.[29] The supporting inference must, however, be a *reasonable* one.[30]

The Court of Appeals drew from the evidence inferences which, if actually drawn by the jury in this case, imply that the jury fell far short of a fair performance of its constitutional function.[31]

This Honorable Court has recently reaffirmed the proposition that juries are not to be presumed to have failed in the performance of their duty to decide cases fairly and impartially.[32] If that presumption be indulged in here, we submit that it cannot possibly be said that the jury inferred as the Court of Appeals thought it might have done, under the circumstances of this case.

The only reasonable conclusion which can be drawn is that the jury arrived at its verdict for respondent in this case because it was not properly instructed as to the law. In this instance, the Trial Court did not charge the jury on the rule of *The Pennsylvania*. Therefore, to prevent a miscarriage of justice, a new trial should be ordered.[33] There was no evidence upon which a fair and reasonable inference could have been drawn by the jury to rebut the presumption of causation which flowed from respondent's failure to keep a proper lookout aboard its tug.

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[29] Ferguson v. Moore-McCormack Lines, Inc., 77 S. Ct. 457 (1957).

[30] Senko v. LaCrosse Dredging Corp., 77 S. Ct. 415, 417 (1957): "The essence of this discretion is that a jury's decision is final *if* it has a *reasonable* basis, . . . " (Emphasis added)

[31] See Wilkerson v. McCarty, 336 U. S. 53, 69 S. Ct. 413 (1949).

[32] Ibid.

[33] Whiteman v. Pitrie, 220 F. 2d 914 (CCA 5th, 1955); Marsh v. Ill. Central R. Co., 175 F. 2d 498 (CCA 5th, 1949).

## ARGUMENT

(1)

### The Rule of The Pennsylvania Should Apply

The question of the applicability of the rule of *The Pennsylvania* in Jones Act claims has been presented to the Courts of Appeals in two recent cases.[34]

In one case[35] the violation or statutory fault involved the number of the crew. In the other case[36] the violation was the failure to carry a licensed tankerman by a vessel engaged in transporting oil. Neither case applied the presumption of fault which flows from the rule; but, neither case was one of *collision*, involving a *navigational* rule breach.

The instant case, insofar as its classification by the type of disaster, is a case of "collision".

It seems well established that "collision", as used in admiralty parlance, involves the striking of a fixed object by a vessel, as well as the striking of two vessels.[37] There is no doubt that the SUWANNEE'S tow and, in fact the vessel herself, collided with the bank of the waterway in which she was running.[38]

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[34] Mason v. Lynch Bros. Co., 228 F. 2d 709 (CCA 4th, 1956); Pierro v. Carnegie-Illinois Steel Corp., 186 F. 2d 75 (CCA 3d, 1950).
[35] Pierro v. Carnegie-Illinois Steel Corp., supra.
[36] Mason v. Lynch Bros. Company, supra, note 34.
[37] Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 17 S. Ct. 572, 41 L. Ed. 1004 (1896); Atlee v. Northwestern Union Packet Co., 21 Wall. 389, 22 L. Ed. 619 (1874).
[38] R. 150.

In one of the cases previously referred to, the Court of Appeals for the Fourth Circuit found that it was unnecessary to consider whether the rule of *The Pennsylvania* ought to be applied in the case.[39] Therefore, it cannot be said that this case *holds* that the rule is inapplicable.

In the other case, however, the Court of Appeals for the Third Circuit squarely held the rule to be inapplicable.[40] That case, while refusing to apply the rule to its facts, seems to furnish a sound reason for applying the rule to the facts of the instant case. The Court of Appeals for the Third Circuit held that the presumption of fault embodied in the rule is a function in admiralty, used in the technique for determining fault of vessels involved in disasters.[41] The court further describes the rule as a "product of philosophy peculiar to United States admiralty law, that disasters are likely to occur when statutes passed for the express purpose of promoting safety in navigation are violated."[42]

Thus, this Honorable Court held, in the case of *The Pennsylvania*:

> "Such a rule is necessary to enforce obedience to the mandate of the statute."[43]

There seems to be no sound reason for distinguishing between property damage claims and personal injury claims

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[39] Mason v. Lynch Bros. Company, supra, note 34.
[40] Pierro v. Carnegie-Illinois Steel Corp., supra, note 34.
[41] Pierro v. Carnegie-Illinois Steel Corp., 186 F. 2d 75, 78.
[42] Ibid.
[43] The Pennsylvania, 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148, 151.

arising out of violations of navigational statutory enactments.

Actually, the esteem with which we regard human life and limb requires a more ready application of the rule in the instant situation than in those cases wherein only a ship, or cargo, or a wharf are damaged.

There is, in protecting human life and limb, at least the same necessity for enforcement of obedience to the statutory rules as is found in protecting property.

(2)

**The Court of Appeals' Appraisal of the Evidence and Its Permissive Inferences Was Erroneous, Was Based Upon an Incorrect Standard and Results in a Miscarriage of Justice**

In the opinion of which review is now sought, the Court of Appeals did *not* say that there was any evidence from which the jury could have reasonably inferred that a proper lookout *was* maintained aboard the SUWANNEE prior to and at the time of the disaster. At best, the Court of Appeals found that whether or not a proper lookout was maintained is, ordinarily, a question of fact.

Under the instant evidence, *the lookout was in the galley* of the vessel.[44] This is the only evidence regarding a look-

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[44]R 152-153.

out and it admits of only one reasonable inference: there was no lookout at all.[45]

The rule prescribed for navigation in the waters in which the SUWANNEE was then travelling required that the vessel maintain a "proper lookout".[46] Having failed to maintain *any* lookout, the SUWANNEE was guilty of a "statutory fault."[47]

Under the rule of *The Pennsylvania,* the fact of the "statutory fault" created a presumption, and a strong presumption, that the disaster was caused or contributed to by the failure to have a lookout.

The question with which the Court of Appeals was then confronted was whether there was evidence from which a reasonable inference could have been drawn by the jury that the failure to have a lookout, not "would have made no difference", but, *could* have made no difference in the ultimate result, i. e., the collision and sinking.

In upholding the jury's verdict, the Court of Appeals regarded as determinative the evidence that the SUWANNEE was unmaneuverable because of her heavy load and speed. From this evidence, the Court of Appeals held that the jury was warranted in inferring that a lookout *would* not have made any difference in the outcome. Even if the standard of "would" or "did" were the proper one, we respectfully submit that the evidence relied on to support the jury's verdict for respondent is, in reality, condemning

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[45]See G. B. Zigler Co. v. Barker Barge Line, 167 F. 2d 676, 678 (CCA 5th, 1948).
[46]33 U. S. C. A. 221.
[47]G. B. Zigler Co. v. Barker Barge Line, supra, note 45.

evidence of respondent's negligence on grounds other than failure to have a proper lookout.

To put the same proposition differently, if the jury had actually inferred from the evidence that the SUWANNEE was overladen and travelling too fast under the circumstances, it is not reasonable to assume that the question of lookout would have even been decided; the verdict would have been for petitioner on the basis of unmanageverability or excessive speed, or both.[47A]

We respectfully submit that, if we are to assume that the jury will fairly perform its constitutional function,[48] this jury must be presumed to have returned its verdict for respondent because it was not properly instructed as to the law, regarding the presumption of causation which flows from the failure to have a lookout.

The trial Judge charged the jury that petitioner had the burden of proving that the sinking occurred through the negligence of respondent. However, the Judge did *not* tell the jury that this burden was legally met by the mere proof of a violation of the statute on lookout, unless respondent could prove that this violation *could* not have caused or contributed to the sinking. This latter burden respondent did not carry; therefore, had the jury been properly instructed, it must be presumed that the verdict would have been in petitioner's favor. Consequently, a new trial should be granted.[49]

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[47A] R 143, 149.
[48] Wilkerson v. McCarty, supra, note 31.
[49] Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037 (1941).

WHEREFORE, this cause merits the consideration of this Honorable Court and a remand for new trial under proper legal instructions, toward which end the foregoing petition is

Respectfully submitted,

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## APPENDIX "A"

(Number and Title Omitted)

(March 27, 1957.)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

HUTCHESON, Chief Judge: Appellant Wilson brought this suit under the Jones Act for personal injury and property damage allegedly sustained when the tug SUWANNEE, on which he was employed by the appellee as a cook, sank in the Intracoastal Waterway near Mile 244, West of Harvey, Louisiana, at approximately 3:00 A. M. the night of February 4, 1950. Appellant's motions for directed verdicts were overruled. The jury returned its verdict for the defendant, appellee, after which appellant's motions for judgment NOV and in the alternative, for a new trial were overruled. The primary question to be considered here is whether, under the circumstances, the failure of the SUWANNEE to have a lookout upon the lead barge which it was pushing is presumed as a matter of law to have contributed to the sinking, placing upon the SUWANNEE the burden of establishing that its failure to have a lookout did not, or could not, have contributed to the sinking.

Shortly before 3:00 A. M., the SUWANNEE, a 650 H.P. diesel tug, engine room controlled and 76 feet in length, was proceeding eastward at six knots, with a three and one-half mile current pushing her, towards New Orleans in the Intracoastal Waterway, pushing a tow of two loaded oil barges each 250 feet in length and 50 feet in breadth.

The tow was lashed to the tug with one inch cable. As the SUWANNEE approached a fifty degree bend in the waterway near Mile 244, West of Harvey, Louisiana, Pilot Adams sounded the proper signal, one prolonged blast. There was no answer, but Adams, the only man in the pilot house on watch, saw the searchlight of another vessel around the bend. Shortly thereafter the tug E. D. SMITH, without a tow, rounded the bend proceeding westward. These vessels, each on its proper, the starboard, side of the channel met and passed safely, port to port.

When the lead barge of the SUWANNEE'S tow was one hundred feet from the bend and the SMITH abreast of the SUWANNEE, Adams sighted an unidentified tow of more than one barge following the SMITH by about two hundred yards and hogging the center of the channel. Immediately realizing the danger of collision, Adams sounded the danger signal, reversed his engine full astern and put the wheel hard right in order to bring the tow closer to the bank. The headway of the SUWANNEE was not checked by reversing the engine full astern since her stopping distance under the circumstances was a quarter of a mile.

The lead barge of the SUWANNEE struck and slid along the bank of the channel as the unidentified tug and tow passed a few feet away. As a result of the SUWANNEE'S tow striking the bank one cable parted, leaving the other intact, the ultimate effect of which was to pull the stern of the SUWANNEE into the bank, causing to list, take on water and, finally, to sink.

During all of this time the appellant was asleep in his bunk below deck. It was during his escape from the sinking

tug that he allegedly sustained the injury for which this suit was brought.

In addition to Pilot Adams and the engineer on watch, a deckhand, who was a lookout in conjunction with other duties to be performed as requested, was on watch at the time of the accident and was in the galley where, according to Adams, he was supposed to be.

Citing 33 U.S.C.A. §221,[1] and relying upon *Zigler Co. v. Barker*, 5th Cir. 1948, 167 F. 2d 676, and *Smith v. Bacon*, 5 Cir., 1952, 194 F. 2d 303, appellant contends that the appellee failed to maintain the proper lookout required by law, casting upon the appellee the burden of showing that its failure not only did not, but could not, have caused or contributed to the sinking under the "Pennsylvania Rule", The PENNSYLVANIA, 86 U. S. 125 (1873); and that appellee offered no evidence to rebut the legal presumption of causal connection between the sinking and the lack of a lookout, thus entitling appellant to a directed verdict.

We cannot agree. Under the circumstances, whether appellee maintained a proper lookout was a question of fact. In *Parker Bros. & Co. v. De Forest*, 221 F. 2d 377, (1955), we said: "This Court did not intend, by its reaffirmation in Smith v. Bacon, supra, of the rule previously set forth in

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[1] "USUAL ADDITIONAL PRECAUTIONS REQUIRED GENERALLY. Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

the Zigler case, supra, to lay down 'an arbitrary rule requiring tug operators to maintain a lookout on the lead barge of every tow regardless of the circumstances,' . . . The wording of the rule itself, as well as the controlling facts upon which the Smith and Zigler decisions are based, clearly reveal that a separate and independent lookout aboard a tug or the lead barge of its forward tow are not inexorable requirements of prudent tug navigation, but show that the question of competency of a lookout in any instance is primarily one of fact, to be realistically resolved under all of the circumstances . . . ".[2]

Considering the cumbersome maneuverability of the SUWANNEE with two loaded oil barges, together with the fact that it took a quarter of a mile to stop with her engine full astern, the small additional time within which to act, which might have been gained if a lookout had been on the lead barge in a position to sooner sight the unidentified tow and pass the word to Pilot Adams, was no more than a circumstance to be considered by the jury, and under these conditions as a whole the jury was warranted in finding that the outcome would have been no different if the lookout had been posted.

Appellant's alternate contention that he was entitled to a new trial for the refusal of the Court to grant a requested instruction and because the Court, in giving supplemental instructions requested by the jury, injected the circumstance

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[2]See also Koch-Ellis v. Chemical Barge Lines, 244 F. 2d 115, 5 Cir. 1955; Compania de Maderas, Etc. v. The Queenston Heights, 220 F. 2d 120, 5 Cir. 1955, and Petrich v. Hansen, 204 F. 2d 261, 9 Cir. 1953.

of fog when there was no evidence regarding fog in the record is without merit. The requested instruction was adequately covered by the Court's general charge and the comment regarding the fog was merely by way of illustration and clarification, not framed in such a way as to mislead the jury.

The judgment is, accordingly, AFFIRMED.

## CERTIFICATE OF SERVICE

I, the undersigned, being a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served a copy of the attached Petition upon the attorney for Respondent by depositing the same in the U. S. mails, postage pre-paid, at New Orleans, Louisiana, addressed to Paul A. Gaudet, Esq., c/o Deutsch, Kerrigan and Stiles, Attorneys at Law, Hibernia Bank Building, New Orleans 12, Louisiana.

July _____, 1957.

Samuel C. Gainsburgh